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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

David Burns,

Plaintiff,

v.

Davis, et al.,

Defendants.

Case No. 2:19-cv-00218-RFB-BNW

ORDER

Before the Court is plaintiff David Burns's motion for issuance of summonses. ECF No. 25. Burns asks the Court to issue summonses for defendants Barfield and Mena. For the reasons stated below, Burns's motion is granted in part and denied in part.

I. Background.

Burns asserts a single claim under 42 U.S.C. § 1983, and he initiated this matter with a complaint and application for leave to proceed in forma pauperis. ECF No. 1. Burns has since amended his complaint. ECF No. 11. The district judge screened Burns's amended complaint and found that Burns stated a viable claim under the Eighth Amendment of the United States Constitution. *Id.* The operative complaint is at ECF No. 12, and Burns's Eighth Amendment claim proceeds against defendants Davis, Mena, Lester, Barfield, Varney, and Rowley. ECF Nos. 11 and 12.

In February 2020, this Court issued an order that bears directly on Burns's motion. First, the order granted IFP status to Burns and ordered that service be complete by May 18, 2020. ECF No. 17 at 2. Second, the order directed Nevada's Office of the Attorney General to file a notice advising Burns and the Court of: (a) the names of the defendants for whom it accepts service; and (b) the names of defendants for whom it does not accept service. *Id.* Third, for the latter category of defendants, the Court ordered the Attorney General to file those defendants' last-known addresses under seal, to the extent it had that information. *Id.* Fourth, if the Attorney General could

1 not accept service for any of the named defendants, Burns was ordered to file a motion identifying
2 the unserved defendants and requesting the issuance of summonses. *Id.* at 2–3.

3 Subsequently, the Attorney General filed a notice of acceptance of service. ECF No. 18. In
4 the notice, the Attorney General accepted service on behalf of defendants Davis, Lester, Rowley,
5 and Varney. *Id.* at 1. The Attorney General declined to accept service on behalf of defendant
6 Barfield and instead filed his last-known address under seal.¹ *Id.* The Attorney General’s notice
7 made no reference to defendant Mena. *Id.*

8 Burns filed the underlying motion on July 9, 2020. ECF No. 25.

9 **II. Discussion.**

10 This Court construes Burns’s motion as one to issue summonses for—and to effect service
11 of process upon—Barfield and Mena.² When a party proceeds in forma pauperis, the Court “shall
12 issue and serve all process.” 28 U.S.C. § 1915(d); *Puett v. Blandford*, 912 F.2d 270, 273 (9th Cir.
13 1990) (“a party proceeding in forma pauperis is entitled to have the summons and complaint
14 served by the U.S. Marshal.”).³ Here, Burns proceeds IFP and he has viable claims against
15 Barfield and Mena.

16 **A. Summonses.**

17 The Court will direct the Clerk of Court to issue a summons for Barfield. However, the
18 Court is unable to do the same for defendant Mena because it lacks his address. The Attorney
19 General was required to either accept or decline to accept service for Mena. However, the
20 Attorney General’s notice declined to address Mena at all.

21 Based on Burns’s allegations, Mena was an employee of the Ely State Prison during the
22 events alleged in Burns’s complaint. *See* ECF No. 11 at 3. Thus, the Court will order the Attorney
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25 ¹ The Attorney General filed a notice to Burns informing him of its submission of Barfield’s last-
known address. ECF No. 20. The Attorney General certified that a copy of this notice was sent to Burns at his current
record address. *Id.*

26 ² Pro se filings must “be liberally construed.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

27 ³ Section 1915(d) dovetails with Rule 4, which provides that upon the request of a plaintiff
28 authorized to proceed in forma pauperis, the Court “must” order “that service be made by a United States marshal or
deputy or by a person specifically appointed by the court.” FED. R. CIV. P. 4(c)(3).

1 General to comply with the Court’s order at ECF No. 17 as it pertains to Mena. Until the Court
2 has a valid address, the Court is unable to direct the Clerk of Court to issue a summons for Mena.

3 **B. Service.**

4 Once the summonses are issued, it necessarily follows that Burns must effect service upon
5 both Barfield and Mena.

6 Failure to serve a defendant within the time allotted is grounds for dismissal of that
7 defendant. Fed. R. Civ. P. 4(m). As previously stated, an IFP plaintiff like Burns is entitled to the
8 Court’s aid in serving all process. 28 U.S.C. § 1915(d); Fed. R. Civ. P. 4(c)(3). But according to
9 Rule 4’s plain text, Burns’s right to the Court’s aid does not attach until he requests it. Fed. R.
10 Civ. P. 4(c)(3) (explaining that the Court “must” order that the U.S. Marshal effect service “[a]t
11 the plaintiff’s request”). In *Boudette v. Barnette*, for example, the Ninth Circuit held that an IFP
12 plaintiff “remain[s] responsible for timely service” until he makes the service request. 923 F.2d
13 754, 757.⁴

14 Here, the deadline for service was May 18, 2020. ECF No. 17. Burns did not file his
15 motion until July 9, 2020, well after the service deadline lapsed. ECF No. 25. Under *Boudette*,
16 Burns was responsible for timely service on the day that the May 18 deadline lapsed. Therefore,
17 the Court must either extend the time for service or dismiss Burns’s claim against Barfield and
18 Mena without prejudice. *See* Fed. R. Civ. P. 4(m).

19 Rule 4(m) requires a two-step analysis to determine whether to extend the time for
20 service. *In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001). At the first step, the Court “must”
21 extend the time for service “upon a showing of good cause.” *Lemoge v. United States*, 587 F.3d
22 1188, 1198 (9th Cir. 2009). At the second step, the Court “may” extend the time for service “upon
23 a showing of excusable neglect.” *In re Sheehan*, 253 F.3d at 512.

24 For the first step, a showing of good cause requires, at a minimum, excusable neglect. *In*
25 *re Sheehan*, 253 F.3d at 512. To determine whether excusable neglect rises to the level of good
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27 ⁴ *Boudette* construed a prior version of Rule 4 that contained substantially similar language to the
28 operative version of Rule 4. *Id.*

1 cause, the Court must analyze whether: (1) the party to be served received actual notice of the
2 lawsuit; (2) defendant would suffer no prejudice by the extension; and (3) plaintiff would be
3 severely prejudiced if his complaint were dismissed. *Id.* at 512. At this first step, the Court must
4 afford a pro se civil rights litigant “considerable leeway,” “especially when the litigant is
5 incarcerated.” *McGuckin v. Smith*, 974 F.2d 1050, 1058 (9th Cir. 1982) (emphases omitted),
6 *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997).

7 At the second step, Rule 4 “permits the district court to grant an extension even in the
8 absence of good cause,” so long as there is excusable neglect. *Efaw*, 473 F.3d at 1040; *Lemoge*,
9 587 F.3d at 1197. The Ninth Circuit has declined to articulate a test that a court must apply to find
10 excusable neglect, but it is clear that the trial court’s discretion at the second step “is broad.” *In*
11 *re Sheehan*, 253 F.3d at 513. Other courts have allowed the following equitable factors to guide
12 their discretion at the second step: (1) the danger of prejudice to the opposing party; (2) the length
13 of the delay and its potential impact on judicial proceedings; (3) the reason for the delay; and (4)
14 whether the movant acted in good faith. *Trueman v. Johnson*, 2011 WL 6721327, at *5 (D. Ariz.
15 2011).

16 The Court may sua sponte extend the deadline for service. *Andrade v. United States*, 2019
17 WL 3778672, at *5 (S.D. Cal. Aug. 12, 2019); *Scott v. Cox*, 2020 WL 569879, at *2 (D. Nev.
18 Feb. 5, 2020). However, it is unable to do so in this matter because it lacks sufficient information
19 to exercise its discretion. Burns’s motion contains only two sentences and it does not explain why
20 Burns filed his motion nearly two months after the service deadline had lapsed. Even after
21 affording Burns’s motion the broadest possible construction, the Court is unable to discern
22 whether there exists good cause for the first step of the analysis or, alternatively, excusable
23 neglect for the second. Therefore, the Court declines to order service upon Barfield until Burns is
24 able to establish the good cause or excusable neglect necessary to acquire an extension of the
25 service deadline.⁵ Instead, the Court will order Burns to file a motion to extend the time for
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27 ⁵ Even if the Court were able to discern a basis for extending the service deadline, the Court could
28 not order service upon Mena because neither the Attorney General nor Burns provided a valid address for him.

1 service. In the motion, Burns must articulate a reason for why he waited moved for the issuance
2 of summonses until after the expiration of the service deadline.

3 **III. Conclusion.**

4 IT IS THEREFORE ORDERED that Burns's motion for issuance of summonses (ECF No.
5 25) is GRANTED in part and DENIED in part.

6 IT IS ORDERED that the Clerk of Court is directed to issue a summons, under seal, for
7 defendant Joshua Barfield, using the address under seal at ECF No. 19.

8 IT IS FURTHER ORDERED that Nevada's Office of the Attorney General has until July
9 22, 2020, to comply with the Court's order at ECF No. 17 at it pertains to defendant Mena.

10 IT IS FURTHER ORDERED that by August 14, 2020, Burns must file a motion to extend
11 the time for service upon Barfield and Mena under Federal Rule of Civil Procedure 4(m). In his
12 motion, Burns must articulate the reason for his failure to request service before the May 18 service
13 deadline.

14 IT IS FURTHER ORDERED that by August 14, 2020, Burns must also file a motion to
15 effect service of process upon Barfield under Federal Rule of Civil Procedure 4(c)(3). If the
16 Attorney General does not accept service on Mena's behalf, Burns must include a request to serve
17 Mena, too.

18 IT IS FURTHER ORDERED that either party's failure to comply with the deadlines in this
19 order will result in the issuance of an order to show cause.

20 DATED: July 15, 2020.



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22 BREND A WEKSLER
UNITED STATES MAGISTRATE JUDGE
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